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No. 1030

# In the Supreme Court of the United States

October Term, 1964

COVEY OIL COMPANY, VALLEY OIL COMPANY, FRANK FERGUSON, FRED SMITH, and JACK WILES, Petitioners,

vs.

CONTINENTAL OIL COMPANY and TEXACO, INC., Respondents.

PYRAMID OIL COMPANY, PREMIUM OIL COMPANY, and QUALITY OIL COMPANY, Petitioners,

vs.

CONTINENTAL OIL COMPANY and TEXACO, INC., Respondents.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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## INDEX


| | Page |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 3 |
| Questions Presented | 3 |
| Statutes & Federal Rules Involved | 5 |
| Statement | 5 |
| Reasons for Granting the Writ | 9 |
| Conclusion | 16 |
| Appendix A | |
| Decision, District Court | A1 - A17 |
| Appendix B | |
| Decision, Court of Appeals | B1 - B12 |
| Appendix C | |
| Stay, Court of Appeals | C1 - C2 |
| Appendix D | |
| Robinson-Patman Act | D1 - D2 |
| Federal Rules of Civil Procedure | |
| Rule 26 | D3 |
| Rule 30 | D3 - D4 |
| Rule 45 | D5 |

## TABLE OF AUTHORITIES

Cases Page

*Federal Trade Commission vs. Sun Oil Company,*
371 U.S. 505, 9 L. ed. 2d 466, 83 S. Ct. 358 (1963) ..... 3, 8, 9, 12, 15

*United States vs. Great Northern Railway Company,*
U.S.D.C. N.D. California S.D., 18 F.R.D. 357 (1955) ..... 12

Articles

Judicial Conference Study Group on Pre-Trial Procedure in Protracted Litigation, 25 F.R.D. 351 ..... 14

Statute

28 U.S.C.A. 1254 ..... 3

15 U.S.C.A. 13 ..... 5

Federal Rules of Civil Procedure:

Rules 26, 30, 45. ..... 5

No. .....

# In the Supreme Court of the United States

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COVALLEY OIL COMPANY, VALLEY OIL COMPANY, FRANK FERGUSON, FRED SMITH, and JACK WILES,

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vs.

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Respondents.

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PYRAMID OIL COMPANY, PREMIUM OIL COMPANY, and QUALITY OIL COMPANY,

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vs.

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Respondents.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioners pray that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit entered in the above cases on January 21, 1965.

## OPINIONS BELOW

The case in the United States District Court for the District of Utah, Central Division, and now pending before the court in which the subpoenas duces tecum were issued in discovery proceedings is: Uintah Oil Refining Company, a Utah corporation, and Utah Co-operative Association, a Utah corporation, plaintiffs, vs. Continental Oil Company, Texaco, Inc., Phillips Petroleum Company, Standard Oil Company of California, California Oil Company, American Oil Company, Sinclair Refining Company, Union Oil Company of California, and Socony Mobil Oil Company, Inc., defendants, Civil No. C-5-62. Motions to quash subpoenas duces tecum are in cases entitled Covey Oil Company, Valley Oil Company, Frank Ferguson, Fred Smith and Jack Wiles, petitioners, vs. Continental Oil Company and Texaco, Inc., respondents and Pyramid Oil Company, Premium Oil Company and Quality Oil Company, petitioners, vs. Continental Oil Company and Texaco, Inc., respondents. Memorandum decision of Judge A. Sherman Christensen in these cases is contained in Appendix A at pages A-1 to A-17. The opinion in the United States Circuit Court of Appeals for the Tenth Circuit in the cases of Covey Oil Company, Valley Oil Company, Frank Ferguson, Fred Smith, and Jack Wiles, petitioners, against Continental Oil

Company and Texaco, Inc., respondents, and Pyramid Oil Company, Premium Oil Company and Quality Oil Company, petitioners, against Continental Oil Company and Texaco, Inc., respondents, Case Nos. 7989 and 7990, dated January 21, 1965, is contained in Appendix B at pages B-1 to B-12. Order granting Motion for Stay to March 30, 1965, is Appendix C, pages C-1 and C-2.

## JURISDICTION

The order of the Circuit Court denying rehearing was dated March 2, 1965. Jurisdiction of this Court is invoked under 28 U.S.C.A. 1254. A Federal question decided in conflict with the applicable decision of this Court may be stated as follows: Is an independent oil wholesaler-jobber-dealer a competitor of the major refiner-producer-wholesaler-jobber-dealer under the good faith defense doctrine of Section 2 (b) of the Robinson-Patman Act? The case in conflict is *Federal Trade Commission vs. Sun Oil Company,* 371 U.S. 505, 9 L. ed. 2d 466, 83 S.Ct. 358 (1963). The important question of Federal law which has not been, but should be, settled by this Court is whether a subpoena dues tecum requiring an independent supplier not a competitor of the major refiner-supplier to produce confidential competitive trade secrets under the Federal Rules of Civil Procedure is an unreasonable burden and oppressive.

## QUESTIONS PRESENTED

In a Sherman antitrust action a defendant sought discovery under Rules 26 (b), 30 (b) and 45 (b) of

the Rules of Civil Procedure of a non-party independent oil wholesaler-jobber-dealer. The independent non-party witness filed a motion to quash the subpoena on the ground that it would require a non-party witness to reveal competitive trade secrets. The District Court nevertheless denied the motion to quash. The Court of Appeals affirmed. Questions presented are:

1. Whether the non-party independent oil wholesaler-distributor-jobber-retailer is a competitor of the defendant Continental Oil Company, a major integrated producer-refiner-wholesaler-jobber-retailer as defined under Section 2 (b) of the Robinson-Patman Act. (See Appendix D, pages D-1 and D-2.)

2. Whether a finding of relevancy under Rule 26 (b) entitles a party defendant in an antitrust action to seek discovery against a non-party when the non-party is not a competitor of the party.

3. Whether or not a protective order can cure the annoyance, embarrassment, and oppression caused by compelling a non-party to divulge competitive trade secrets under Rule 30 (b) to a party defendant.

4. Whether compelling a non-party, non-competitive witness to produce its competitive trade secrets under Rule 45 (b) is oppressive and unreasonable.

5. Whether the order of the Circuit Court permits an abuse of the discovery procedures in antitrust gas and oil cases involving non-party witnesses.

## STATUTES AND FEDERAL RULES INVOLVED

The pertinent portions of Section 2 (a) and Section 2 (b) of the Robinson-Patman Act 15 U.S.C.A. 13 and Rules 26, 30 and 45 of the Federal Rules of Civil Procedure are set forth in Appendix D at pages D-3 to D-5.

## STATEMENT

This action arises out of discovery proceedings instituted in the cases of Uintah Oil Refining Company, a Utah corporation, and Utah Cooperative Association, a Utah corporation, plaintiffs, vs. Continental Oil Company, Texaco, Inc., Phillips Petroleum Company, Standard Oil Company of California, California Oil Company, American Oil Company, Sinclair Refining Company, Union Oil Company of California, and Socony Mobil Oil Company, Inc., defendants, in Civil No. C-5-62 in the United States District Court for the District of Utah, Central Division. Of the nine defendants, seven have been stipulated out of the case and there remain Continental Oil Company and Texaco, Inc.

Continental Oil Company began its discovery proceedings by service of subpoenas duces tecum against these petitioners on September 30, 1964, asking that the petitioner produce the following: Its books, records, papers, documents, notes, memorandum, etc., in respect to its gasoline business for the years commencing with 1958 through 1963; annual volume in gallons and dollars of regular and premium gasoline purchased

from each supplier; sales at retail at each station operated by the company and stations not operated by the company; the price paid for each purchase for resale of regular or premium gasoline and the retail price changes; any and all price concessions received or extended in connection with any sale of gasoline; competitive conditions, prices, reports of salesmen or analysis or reports of any kind relating to the marketing of regular or premium gasoline; pricing policies or procedures; share of the market and quality of gasoline purchased or sold; leases of service stations; contracts for purchase or sale of gasoline; corporate minutes; annual profit and loss statements with balance sheets and other books, records, and memorandum.

Motion to quash this subpoena was filed October 5, 1964, hearing on the motion was October 12 and 13. Defendant modified its request in part and the Court by memorandum decision November 17, 1964, reduced the scope of the subpoena and issued a protective order as follows: Defendant is permitted to inquire into four categories -- (1) Actual purchase price of all gasoline purchased, (2) Actual sales price of all gasoline sold other than at retail, (3) Volume in gallons of gasoline sold each month segregated according to city, with separate figures for regular and premium, (4) Number and location of service stations owned, operated or leased. The Court in connection with the motion made a protective order as found on pages A-15 to A-16 of Appendix A and provides in part: "Subpoenas and depositions in this case shall be delivered or made available only to counsel for the parties hereto or an independent certified public accountant designated by them and

shall be used solely for the purpose of the above-entitled case unless after notice the Court otherwise orders. Any summaries or notes prepared by counsel or the independent certified public accountant shall be furnished only to counsel or to personnel of the parties, shall be so furnished only to the extent essential to the preparation of the case. . . . None of the said material . . . shall be used for business or competitive purposes, including business or competitive purposes against the witness or the company he represents or its suppliers. Nothing contained herein shall limit access to material or information actually received in evidence at the trial. . . ."

Affidavits in support of the motion were filed showing irreparable damage and extreme hardship to petitioners. Witness Davis said disclosure would be breach of trust and give unfair competitive advantage. Witness Bruggeman said Covey Oil Company has not initiated a price change; Continental has persistently tried to get the price information since 1958 for obtaining competitive advantage; Continental could then eliminate Covey as a competitor; no protective order could keep information from being detrimental.

Notice of appeal from the decision of the District Court was filed with the Court of Appeals December 2, 1964. Temporary Stay pending the granting of the appeal was obtained from the District Court signed November 27, 1964. Stay of the Order of the District Court was granted by the Appellate Court December 14, 1964, until further order of the court. The Court of Appeals on the 21st day of January, 1965, denied the appeal affirming the lower court's decision. Stay was allowed until March 30th to make application for stay

and file Petition for Writ of Certiorari with the Supreme Court. The defendants before the Court of Appeals strongly urged that petitioners had no appealable issue. This the Court carefully considered and found for appellants. The Court found relevancy. The Appellate Court talked about the level of competition and found that the defendant was entitled to the good faith meeting competition defense and that *Federal Trade Comcission v. Sun Oil Company,* 371 U.S. 505, did not apply. It accepted the claim of Continental that appellants are suppliers-retailers and are competitors of Continental under the Robinson-Patman Act which Congress intended. It concluded that Continental and Appellants compete in the wholesale market and that good cause appeared for obtaining the information. It also concluded that the trade secrets did not relate to processes, formulas or methods but to price, cost and volume of sales and this information is not protected. It concluded that no privilege exists and the claim of irreparable competitive injury must be balanced against the need for information and the preparation of a defense. The Court supported its position by saying that the sound discretion of the trial court was not abused and pointed with approval to the protective orders of the trial court. The Court took the view that by the protective order the information obtained could not be used for business or competitive purposes. It found that harm may result to some of the appellants but that harm is a justified product of competition.

## REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it erroneously interprets the rule in *Federal Trade Commission vs. Sun. Oil Company,* supra. This rule has not been applied by this Court to a situation involving a non-party witness as it pertains to discovery. Hardship and oppression results to independent oil companies by the application of the rules of discovery in non-party witness proceedings and is a matter that should be reviewed by this Court.

1. It is very doubtful that a non-party independent oil dealer is a competitor of a major integrated producer and refiner under the definition of a "competitor" in Section 2 (b) of the Robinson-Patman Act. (See Appendix D, pages D-1 and D-2.)

Your petitioners are independent oil wholesalers-jobbers-retailers. They buy gasoline from some or all of the major integrated oil defendants. Under *Federal Trade Commission v. Sun Oil Company* a competitor refers to the seller who grants and not to a buyer who receives the discriminatory price cut. The lower court fell into the argument presented by the Sun Oil Company before this Court that the dealer is but a "conduit" which makes every supplier and every retailer competitors. As pointed out, this would so expand the Section 2 (b) defense as to avoid the very purpose and intent of the Robinson-Patman Act amendments. For instance, Continental is a major integrated producer-refiner-wholesaler-jobber-retailer. To be a competitor of such a major integrated company it would seem that the independent would have to be able to produce, refine,

buy and sell on the same basis as the integrated company. The Court of Appeals refused to follow this interpretation and in effect made the independent oil companies, no matter how far down the line their dealings begin and end, competitors of the integrated major company. This conclusion, petitioners maintain, destroys the very concept of the Section 2 (b) defense and the amendments to the Robinson-Patman Act.

2. The Court of Appeals found that the information sought by discovery was relevant under Rule 26 (b). Assume the evidence is relevant, does this entitle a party such as a major integrated oil company to use the evidence against a non-party independent oil company, if the non-party is not a competitor under the Section 2 (b) defense of the Robinson-Patman Act? If this evidence is not admissible, the lower court on the finding of relevancy could allow a major oil company to come in under discovery proceedings and obtain the customer lists of every independent, the volume of gallons sold, the terms of the sale, the basis of credit, service supplied, and without intention of using the information as a good faith defense under Section 2 (b) of the Act, but by subpoena the independent company would have divulged to the major integrated company all of its trade secrets. Could this proceeding, if allowed, be the effective means by which the major integrated companies could proceed to eliminate independent oil dealers?

3. The Court below took the view that a protective order can cure the annoyance, embarrassment and oppressive effect of discovery which compels the divulg-

ing of competitive trade secrets under Rule 30 (b). It is obvious the lower court described at some length its protection to the independent non-party witnesses. And yet, the customer lists, the buying and selling prices, the service features and advantages are to be divulged to independent certified public accountants, the major oil company counsel, personnel of the major oil company, without limit to access of the material if made evidence at the trial.

It is very difficult to suppose that in this age of struggle for survival such a protective order is realistic. By affidavit petitioners predict the divulging of this information will result in the collapse of their organizations and the opening up to ruthless invasion their customers and lease locations. Is it possible that Rule 30 (b) was never intended to compel non-party witnesses to divulge competitive trade secrets?

The District Court made specific mention of Rule 30 (b), that the examination may be made "for good cause shown". In its consideration of the matter it wanted to be entirely satisfied to work out the balance between the annoyance, embarrassment or oppression of the non-party witness as against the demand for discovery by the defendant. And the Court pointed out five specific areas in which it was not satisfied. (See record conference 138 - 139. These were argued to the Court of Appeals but it was not interested. In the absence of specific facts to substantiate good cause should discovery be allowed based upon no more than a surmsie or suspicion that the documents sought would yield information vital to the case? ***United States vs.***

*Great Northern Railway Company*, U.S.D.C. N.D. California S.D. 18 F.R.D. 357 (1955). In the affidavits of the defendant oil company they state in general terms that through deduction they believe a lower price was being paid by the independent dealers to their suppliers than the major oil dealers were paying to their suppliers. (See Record 96 to 100). In the absence of any affidavit or allegation that these defendants specifically were in this classification should they be compelled to divulge their trade secrets on a general searching expedition?

4. The Court of Appeals in determining whether or not the motion to quash should be granted because the subpoena was unreasonable and oppressive distinguished the competitive trade secrets from processes, formulas and methods. By the false assumption that the non-party independents are competitors of the integrated majors the Court concluded that this is one of the hazards of competitive business. How close are customer lists and methods of providing service to processes and formulas insofar as the perpetuation of a competitive relationship is concerned? It would seem that Rule 45 (b) is too narrowly construed by the lower courts. This is particularly true of the independent and major oil situation. National trade journals carry the stories indicating the profitability of major producer - refiner - retailer situations where the losses in marketing can be charged back to depletion and refining profits. Whereas the independent oil jobber has only his buying price to fall back on. Failure of the lower courts to recognize this Court's decision in *Federal Trade Commission vs. Sun Oil Company* has made for a strained aribitrary refusal to relieve

against oppression and unreasonable discovery under enforcement of the discovery rules.

5. The decision of the Court of Appeals permits an abuse of the discovery procedures. If it be assumed that the business secrets being sought would not be admissible at the trial; if it be recognized that petitioners are not competitors of Continental within Section 2 (b) of the Robinson-Patman Act and that Continental cannot lawfully meet their prices; and if it be recognized that the use of petitioners' competitive secrets by Continental could cripple petitioners financially and redound to the benefit of Continental; then Continental is free to gamble on the trial of this action with its possible adverse results in order to obtain by discovery procedures confidential information it could not obtain except by exploiting its position as defendant in an antitrust suit.

It is an abuse of the discovery processes of the court to permit a type of competition which is unfair and contrary to the purposes of the antitrust laws.

The federal rules should promote justice and in determining justice the rights of non-party witnesses should be of great concern, lest small independent businesses be crushed by the juggernaut of overpowering antitrust litigation. The fact that the plaintiffs here are small and claim to be oppressed does not mean that the interests of small independents are in any way being protected. Their plight requires its own consideration.

Neither is it an answer that if Continental hurts petitioners they have a remedy. The facts are that peti-

tioners seem to have found a way to survive between the toes of the major integrated companies. They want to stay in business and not have an action for damages against an integrated company which forced them to close shop.

The Court of Appeals has confidence in the trial judge and has recognized petitioners' right of appeal but has not actually attempted to balance the equities or determine whether Continental should show cause or what cause it should show, if required. The entire matter involves the formulation of a policy by this Court to establish guides for the District Court in this case upon re-analysis of the facts presented, or upon a further hearing before the District Court.

The recommended procedures in the handling of large cases made by the Judicial Conference Study Group on Pre-Trial Procedure in Protracted Litigation, 25 F.R.D. 351, at pages 388 and 389 suggests the necessity of controlling discovery and also using pre-trial conferences to eliminate false issues. At the conference before District Judge Christensen counsel for the plaintiff indicated no interest in the matters being pursued by Continental Oil and no issue on such facts. (See Conference Transcript pages 73-82.)

Petitioners suggest that the use of discovery procedure to obtain business secrets from independent marketers in a highly competitive field presents a difficult litigation problem. Relevancy, under these circumstances, should not be enough to make certain that there is no abuse of the discovery procedure. A standard for balancing equities should be stated by this Court

so that the District and Circuit Courts will know that abuse of the discovery process will not be countenanced.

Petitioners find no authorities directly relating to this problem and for this reason invite this Court to grant certiorari and examine the matter carefully. In the *Sun Oil* case petitioners find support for the belief that this Court is interested in preserving competition in the petroleum marketing idustry:

> "We see no reason to permit Sun discriminatorily to pit its greater strength at the supplier level against Super Test, which, so far as appears from the record, is able to sell its gasoline at a lower price simply because it is a more efficient merchandiser, particularly when Super Test's challenge as an "independent" may be the only meaningful source of price competition offered the "major" oil companies, of which Sun is one. *Federal Trade Commission vs. Sun Oil Company,* 371 U.S. at p. 523.

The Court also indicated that where Congress has spoken on the matter of policy the court will interpret the law; and it might well follow that in matters of policy covered by the Federal Rules it is the ultimate obligation of this Court to balance the needs of litigants against threatened harm to small independent businessmen. 371 U.S. at p. 519.

## CONCLUSION

For the reasons set forth above it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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# APPENDIX A

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

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No. C 5-62

UINTA OIL REFINING COMPANY, a Utah Corporation, and UTAH COOPERATIVE ASSOCIATION, a Utah Corportion, Plaintiffs,

v.

CONTINENTAL OIL COMPANY and TEXACO INC., et al, Defendants.

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## MEMORANDUM DECISION

CHRISTENSEN, J.

This is a suit for damages for alleged conspiracy and monopoly under Sections 1 and 2 of the Sherman Act, 15 U.S.C.A. §§ 1 and 2, and alleged price discrimination under Section 2(a) (d) and (e) of the Clayton Act as amended by the Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13 (a) (d) and (e). The plaintiffs are Uinta Oil Refining Company, which owns and operates a crude oil refinery located at Rangely, Colorado, and markets petroleum and its products in the States of Utah and Colorado, and Utah Cooperative Association, which owns all of the outstanding stock of Uinta and is engaged in the marketing of refined petroleum and related products in Utah. The defendants are major oil companies doing business throughout the country.

The case is set for trial for early 1965. Extensive discovery[1] has been largely completed. The principle pre-trial problem remaining relates to Continental's attempted examination of the officers of various independent oil companies, not parties to this action, which are objecting to disclosure of business information on the claim that it is privileged or confidential, or that no necessity for it's disclosure has been established.

The problem first came to the attention of the court upon Continental's motion for an order pursuant to Rule 37 (a), Fed. R. Civ. P., to require an officer of Chipman Oil Company to answer certain questions at his deposition and to produce the documents specified in a subpoena duces tecum pursuant to Rule 45(b) Fed. R. Civ. P. At an informal hearing in chambers where the deponent, as well as the parties to the action, was represented, it was determined by the court that the necessities of the action required responses subject to protective provisions. Upon suggestions as to form from Continental and counsel for the deponent, the following order was entered.

> " . . . Ordered, that deponent shall answer, as to matters within his knowledge, questions relating to the matters as set forth in Exhibit 'A'[2] attached to the subpoena duces tecum, a copy of which is attached hereto and by references made a part hereof and shall produce documents of Chipman Oil Company relating to the matters as set forth in said Exhibit 'A' for the period 1958 through 1963.

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1. See **Uinta Oil Refining Company v. Continental Oil Company**, D.C. Utah, 226 F. Supp. 495 (1964).
2. In subsequent proceedings Exhibit A has been limited in scope and detail, the modified demand to be set out hereafter.

"The deposition shall recommence on November 12, 1964 at 10:00 A.M. at the office of Chipman Oil Company, 2188 Highland Drive, Salt Lake City, Utah, or at such other time or place as may agreed upon between counsel. It is further

"ORDERED, that the testimony of and documents shall not be used by Continental Oil Company or by any other party for business or competitive purposes, including business or competitive purposes against deponent, or Chipman Oil Company or its customers, or its suppliers."

Thereafter Quality Oil Company and Premium Oil Company moved for an extension of time to produce books and records demanded in similar subpoenas in connection with the deposing of their officers; and Covey Oil Company and Valley Oil Company moved to quash subpoenas served upon their officers, as did Pyramid Oil Company.

Richard E. Harris, Esquire, a member of the Utah State Bar, represented by Arthur H. Nielsen, Esquire, (who is counsel for Frontier Oil Refining Company in its action against Continental and others pending in the other division of this court — C 160-64, Frontier Refining Company v. Continental Oil Company) moved for an order "directing and requiring the taking of depositions . . . to be done in public so as to permit the attendance of the said Richard E. Harris, or any other member of the Bar or officer of this court, unless and until this court, on motion of either party or on motion of a witness to be interrogated, shall by order otherwise limit the persons who may attend at such depositions."

Arguments were heard on these motions on October 12 and 13, 1964.

It was ruled on the Harris motion that attorneys for non-parties should not be excluded from the taking of depositions unless a protective order is made "that the examination shall be held with no one present except the parties to the action and their officers or counsel" or such other restriction is imposed as may be deemed in the interest of justice or necessary to meet the practicalities of space or good order. Rule 30(b) Fed. R. Civ. P.

The motions to quash the subpoenas duces tecum were taken under advisement by the court with the requirement that Continental make further showing by affidavit of the necessity of the demanded disclosures. Since the ruling on pending motions in principle might affect their situations, the court upon its own motion ordered that notice be sent to all unrepresented witnesses who had been served with subpoenas of the same nature and with whom there had been no agreement, to afford them opportunity within a ten day peroid to present their positions by letter or memorandum. The court's previous order concerning Chipman Oil Company was vacated, so that the conclusion of that matter could abide the disposition of the other motions to quash.

Amended motions to quash the subpoenas duces tecum have been filed by Pyramid Oil Co., Quality Oil Company, Covey Oil Company, Premium Oil Company, and Valley Oil Company. James E. Ashton of Frontier, Vernon Eldredge, Jack Wiles, and officers

of Slim Olson, Inc., by memoranda filed herein with the leave of court mentioned above, have asked to be allowed the benefit of any order made upon the motions of the others. Frontier also has asked that it be afforded access to all the data procured by depositions or discovery for use in another suit against the defendants irrespective of any protective orders which may be entered. Slim Olson, Inc. has created another dimension to our problem by suggesting that it would have no objection to furnishing most of the information requested by Continental if other independent companies likewise are required to furnish similar information, all of it to be made available to all of the non-party independents as well as to the parties herein.

Continental has filed a proposed modification of Exhibit "A" attached to its subpoenas duces tecum[3] reading:

> "Defendant Continental Oil Company proposes that the Exhibit 'A' to the Subpoena duces tecum served upon Valley, Covey, Quality, Premium and Pyramid Oil Company be limited to documents showing the following, for the period 1958 through 1963 for the State of Utah:
>
> "1. Actual purchase price of all gasoline purchased.
>
> "2. Actual sales price of all gasoline sold other than at retail.

---

3 The document filed October 14, 1964, states that it is a "proposed Modification of Exhibit 'A' to Subpoena Duces Tecum served upon officers of Valley, Covey, Quality, Premium and Pyramid Oil Companies". If the subpoena is so limited as to these, the Court can see no reason why it should not be so limited as to all those in similar circumsance seeking the benefits of the proceedings here. It therefore will be assumed that Continental's demands beyond data called for by the modification have been withdrawn.

"3. Volume in gallons of gasoline sold each month segregated according to City, with separate figures for regular and premium.

"4. Number and location of service stations owned, operated or leased.

"5. The profit and loss statements of each company and the underlying data used to prepare these statements to determine the profitability of each company's gasoline business."

The questions before me have last been presented in relation to motions to quash the subpoenas duces tecum. However, the same problems arose at the taking of the initial Chipman deposition in view of his refusals to answer. This decision now will guide both the conduct of the oral depositions in question and the supplying of the subpoenaed information. It should also be understood that what is said is not intended to preclude the practical arrangements proposed by Continental, upon agreement, to obtain discoverable data through an independent certified public accountant, so that the material made available to Continental would be by way of summaries of the records. These practicalities may be worked out among the persons and companies concerned within the established guidelines.

It is manifest that most of the subpoenaed data is relevant to the subject matter of this action and particularly to the defenses of defendant Continental.

Section 4 of the Clayton Act, 15 U.S.C.A. § 15, enables any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws to sue for damages sustained by him. Reasonable inquiry concerning circumstances which might tend

to prove that the damages, if any, sustained by plaintiff were not the result of activity of the defendant Continental Oil Company violative of the antitrust laws, or that only a part of such claimed damages were, seems permissible, and information concerning the competitive position of independent oil companies with reference to injuries to competition, impact and monopolization appears not irrelevant. Moreover, concerning defendants' affirmative defenses to plaintiffs' claim based upon alleged violation of the Robinson-Patman Act, information from independent oil companies reasonably throwing light upon the contention that any discriminations by plaintiffs were the result of a good faith meeting of competition, is a proper and relevant subject of discovery.

I am fully mindful of the appropriate wishes of independent oil companies to keep competitive information to themselves insofar as is practical and permissible, and of their apprehensions that information disclosed by the processes of litigation might be used against them. Yet I must also be mindful of the necessity that judicial inquiry be not unduly hampered, especially if restrictions would make impossible the meaningful and lawful disposition of cases that must be tried with fairness to all parties. It would be anomalous, indeed, if the court, as it has during pre-trial conferences, should recognize the issues raised by the allegations of the amended complaint, the denials thereof, and the affirmative defenses interposed, and yet should preclude reasonable discovery from non-party witnesses as well as the parties. The Federal Rules of Civil Procedure permits the examination of "any person" rather

than merely of parties, Rule 30(a), and subpoenas may direct witnesses to appear with their documents, whether parties or non-parties to the litigation, Rule 45.

Apart from the point that defendant has the right to make reasonable discovery concerning the issues of the case, irrespective of whether the discovered facts would or would not be admissible (Rule 26(b) Fed. R. Civ. P.), it is unavoidable that some of the data in each category called for may be subject to offer as a matter of right at the trial. The timing of the inquiry with reference to the trial involves also proper judicial administration. If no previous discovery within reasonable limits is permitted, continuances would be necessitated for such discovery and production during the course of the trial, with all of the attendant delay and expense, and with the probability that the revelations would have even greater impact upon the independent companies.

There seems at this stage little merit to the deponents' argument that no further inquiry of independent oil companies should be permitted because Continental did not have all of the specific pricing information from independents which it seeks here while it claims to have been meeting competition in its own price adjustments, and that theretofore it should be precluded from finding out in retrospect what the actual pricing facts were. It may well be that the meeting of competitive defense does not require a competitor to have actual knowledge of the identity and price of the competitor whose price is being met. Probably all that is required is that a seller show the existence of facts which would lead a reasonable and prudent person to

believe that the granting of a lower price would in fact meet the equally low price of a competitor. *Forrester Mfg. Co. Inc. v. F.T.C.*, 1st Cir., 335 F2 47 (1964). However, it is unnecessary for me to now decide the exact dimensions and applications of this defense for, in any view, as far as discovery is concerned the pricing data sought is clearly relevant.

The other arguments of the protestants, running the gamut between the suggestion that some of the requested data is already available through the defendants' market surveys or otherwise, to the [illegible] contention that the market, pricing and income data of non-party independents are trade secrets that under no condition should be pierced, have been carefully considered. In my opinion they do not justify the motions to quash as to categories 1 to 4 of the modified Exhibit A of the subpoenas, and justification has been shown for the discovery of documents and records concerning these categories under the conditions hereinafetr indicated. See *United States v. Lever Brothers Company, S.D.N.Y.* 193 F. Supp. 254 (1961), *Julius M. Ames Co. v. Bostitch, Inc.*, S.D.N.Y., Sept. 23, 1964, ATRR No. 170, p. A8, Oct. 13, 1964. The recent case of *Olympic Refining Company v. Carter*, 9th Cir., 332 F2 260 (1964), cert. den. Nov. 10, 1964, 33 L. W. 3169, answers these and some of the other questions raised concerning the propriety of discovery of relevant trade secrets or confidential informtion when necessary for the purposes pending or other cases, so long as suitable protective orders are considered in each case.

Category 5 of Exhibit A would call for records showing "The profit and loss statements of each company and the underlying data used to prepare these statements to determine the profitability of each company's gasoline business".

With respect to detailed income data of non-parties the necessity has not been as adequately shown, and the consequences of withholding foundational records at least until further exploration by deposition or trial do not appear so serious. The negation of damages from any conspiracy or discrimination, or the question of monopoly might be lighted up significantly only by comprehensive figures well beyond those relating to the deponents' businesses. It has been represented that figures by some of the protestants with respect to profits do not break down the relevant activities from other business, and at least one of the deponents has offered to testify generally as to the profitable nature of his relevant operations. The materiality of precise figures is questionable;[4] and the information to the extent necessary may be generally provided by depo-

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4 "The Court: Well, now, you're going to make a qualitative or quantitive analysis of profits? In other words, if you find an aggregate profit among independents, you are going to say that because that profit is two percent or five percent . . . that that's different than if it were a little more or a little less?

"Mr. Lowe: Showing—in the first place, your Honor, the number of people in the business—the fact, if it's so, which we haven't found out yet one way or the other, that they are making money and selling gasoline in a volume that may exceed our own volume is relevant in the case, in the first place, to show there has been no impact . . . The significance that I see to it, your Honor, is that they haven't lost money. The amount of the profit is perhaps not so significant. . . .

"The Court: Well, it seems to me that that problem involved so many difficulties in balancing its value in the overall, that there would be considerable question. That's your only justification in wanting the profit and loss statement?

"Mr. Lowe: That's true, your Honor." (October 12, 1964 hearing).

sition or readily provable from income tax or profit and loss statements at the trial. The matters of profits and income in the depth sought ordinarily are treated as confidential, and the ramifications of such disclosures are difficult to evaluate at this time. The foundational data sought would almost completely reveal the operational experiences of the companies and, as now appears, perhaps for other than compelling reasons.

Hence, to avoid complete audits or explorations of profit figures at least at this stage, category five in Exhibit A will be quashed, without prejudice to reasonable inquiry of witnesses on deposition as to the nature of profit records and whether relevant operations produce substantial profits or losses, and without prejudice to a motion for re-examination should the context of developing proceedings indicate that specific figures are important or that an earlier exploration in greater depth has justification. Cf. *U. S. v. Serta Associates, Inc.*, D.C. Ill., 29 F.R.D. 136 (1961).

With reference to the suggestion of Slim Olson, Inc., that information produced from all deponents on deposition should be made available to all other deponents, I need only observe that there are enough problems in necessary discovery in the pending case before the court, even in view of protective orders, without making the information indiscriminately available to numerous other persons and companies who are not parties to any pending suit and as to whom no necessity for the disclosure appears.

Counsel for Frontier insists that, despite any protective orders entered in this case, it should have the right to attend the taking of all deposition and should

be afforded access to all information produced through discovery herein. While it argues that the witnesses for the independent oil companies, including the officers of Frontier who have been subpoenaed, should not be required to produce the information sought by Continental, it says that if all, or any portion of the information sought, is relevant in this case, such information would likewise be equally relevant and should be made available in No. C 160-64, *Frontier Refining Company v. Continental Oil Company,* now pending before Judge Ritter. Frontier's counsel also asks that the parties defendant to this action be restrained from concealing, withdrawing, or destroying information which in the past has been produced or made available or may be in the future, so that Frontier will be assured access thereto. Texaco objects to any such order beyond the purposes of this particular action, pointing out that it is not a party to the case in the other division of the court.

I have already expressed my view that evidence in one case should be available by appropriate proceedings, and after proper notice, for the purposes of other cases.[5] See also *Olympic Refining Company v. Carter,*

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5 "The Court: [W]e should avoid duplicative effort; merely because a case is in one division and one in the other it would be most unforunate in my judgment if any mechanism should obstruct at all discovery in either case, and joint discovery so far as it can be worked out either by order or by stipulation. . . . They (Continental) will have to respond, of course, to any direction that Judge Ritter makes as far as Continental's interest is concerned. . . . Any protective order, it may be understood as far as Continental is concerned, certainly isn't intended to bind the other division of the court. I am concerned with knowing, when I make a protective order for the protection of third parties, that there isn't a disclosure of that information to the prejudice of third parties, without proper consideration being given to them and an opportunity for the court to rule upon the matter." (October 13, 1964 hearing).

supra. The trouble now is that Frontier, without an order or stipulation for consolidation of any opportunity for the court having responsiblity for its case to consider what protective provisions it would wish to apply as to it, would accomplish unified fragmentary discovery without notice to the other independents concerned.

Manifestly, Frontier will be represented at the examination of its own officers in this case. It has no further direct interest in the case before me, and if an order is made protecting the confidentiality of information furnished by other witnesses, it should be precluded over the objection of these other witnesses from violating such confidentiality without in some appropriate manner bringing them into the other case as witnesses. It would be presumptuous, if not improper, for me to say that everything produced here should be made available to Frontier for use there under protective provisions applied for the purposes of that case by me. Moreover, it would be inappropriate for me to assume to preclude the other division from making such orders in the case before it as may be deemed appropriate, including protective provisions upon notice to those who have been assured that, absent notice and opportunity to be heard, the matters I am requiring them to produce will not be used over their objection for purposes other than the case before me.

On similar principle, it would be improper to tell Texaco in this case that it may not, upon the conclusion of this case, under any condition, withdraw or withhold confidential information furnished in this case merely

because the company, not a party here, may wish to discover the same information in a case in which Texaco is not a party, particularly in view of protective orders entered herein heretofore in connection with compelled discovery against Texaco. However, the other division of the court has full authority over the case before it, both as to Texaco officers as witnesses and over Continental as a party. Suffice it for me to direct any information produced as a result of discovery in the case before me shall not be destroyed or otherwise placed beyond the control of any party now possessed of it to the end that as long as this case is pending it will be subject to all appropriate orders and directions of any competent court. To accomplish something further in the particular case before me would require a formal order of consolidation, which I am not inclined to consider at this time, or a stipulation on the part of the parties to the respective action that discovery in one case could be used in both—a stipulation that I have been told is under consideration, but which I cannot compel.

In view of the foregoing considerations and for the foregoing reasons it is hereby ordered:

1. That the motions to strike the subpoenas duces tecum as to paragraph 5 of modified Exhibit A be granted without prejudice as above indicated.

2. That the motions as to all other categories of modified Exhibit A be, and they are, hereby denied.

3. That inquiries and depositions may reasonably proceed and that answers shall be responsive within the general areas which have been indicated by the

court, in harmony with this memorandum. That in the interest of expedition, and to encourage responsible demands and responses, the court will not entertain any further general motions or arguments on the matters covered by this opinion in the absence of compelling reasons, but will remand the parties and witnesses in the event objections are made to questions on deposition, or production under subpoena, to the remedies provided in Rules 37 (a) and 45 (f) Fed. R. Civ. P. Costs and attorneys fees on the present motions and applications will not be allowed.

4. Any documents, books, records and accounts furnished or produced by the witnesses on said pending subpoenas or depositions in this case shall be delivered or made available only to counsel for the parties hereto, or an independent certified public accountant designated by them, and shall be used solely for the purposes of the above entitled case, unless, after notice to or with the consent of the witness and the company he represents, the court otherwise orders. Any summaries or notes prepared by counsel or the independent certified public accountants shall be furnished only to counsel or to personnel of the parties, shall be so furnished only to the extent essential to the preparation of the case, and notice shall be filed of the names of those furnished such summaries or notes. None of the said material, summaries, depositions or transcripts of depositions shall be used for business or competitive purposes, including business or competitive purposes against the witness or the company he represents or its suppliers. Nothing contained herein shall limit access to material or information actually

received in evidence at the trial, subject to such protective orders as the court may make at that time, nor shall it prevent the voluntary furnishing of information to others by the witnesses.

5. The examination of said witnesses on deposition, unless the court otherwise orders, shall be held with no one present except the reporter, the witness and such counsel or representatives of the witness as he may desire to be present, counsel for the parties and not more than one officer or other representative of each party, unless the witness consents that other persons may be present, in which latter event such other person or persons may be present.

6. Any documents, answers to interrogatories, and transcripts of depositions subject to this order shall upon being filed with the clerk of this court be retained under seal by said clerk and shall not be made available to anyone other than the persons authorized hereby to have access to them, except upon order or a judge of this court after notice to, and opportunity to be heard by, the witness in question.

7. In making this order the court does not assume to rule with finality that any specific document, item or deposition actually constitutes or contains confidential information; and nothing herein shall prevent any party hereto or any witness affected from applying to the court for such relief from this order or such further or additional protective order as to the court may seem appropriate.

8. The parties, their counsel, accountants or other representatives, and all other persons afforded access

thereto, are hereby enjoined from utilizing said documents, books and records, data, depositions and transcripts thus produced other than for the purposes of the trial of this action, unless and until, and to the extent that the same are received as evidence in open court without restriction, or unless a judge of this court, with reference to the purposes of this or another case upon notice otherwise orders. Upon the stipulation by the parties to this and any other case pending in this court that discovery in each case shall be available for purposes of the other, the material may be used for the purposes of both cases, subject to the other restrictions herein provided.

9. This order shall have reference only to the depositions of and subpoenas to officers and agents of non-party oil companies in proceedings now pending, unless hereafter extended by the court to cover other witnesses.

Dated this 17th day of November, 1964.

UNITED STATES DISTRICT JUDGE
A. Sherman Christensen

# APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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JANUARY TERM, 1965

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No. 7989

COVEY OIL COMPANY, VALLEY OIL COMPANY, FRANK FERGUSON, FRED SMITH, and JACK WILES, Appellants,

v.

CONTINENTAL OIL COMPANY and TEXACO, INC., Appellees.

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No. 7990

PYRAMID OIL COMPANY, PREMIUM OIL COMPANY, and QUALITY OIL COMPANY, Appellants,

v.

CONTINENTAL OIL COMPANY and TEXACO, INC., Appellees.

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No. 7991

SLIM OLSON, INC., Appellant,

v.

CONTINENTAL OIL COMPANY and TEXACO, INC., Appellees.

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Appeals from the United States District Court for the District of Utah, Central Division

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Before PICKETT, BREITENSTEIN, and HILL, Circuit Judges.

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BREITENSTEIN, Circuit Judge

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These appeals, which were considered on a consolidated record, relate to orders on motions to quash subpoenas duces tecum issued to non-party witnesses. The trial court modified the subpoenas by striking therefrom a requirement as to an identified category of information and otherwise denied the motions to quash.

The action was brought by Uinta Oil Refining Company and Utah Cooperative Association, which are not parties to these appeals, against Continental Oil Company and Texaco, Inc., appellees herein, to recover damages for alleged violations of §§ 1 and 2 of the Sherman Act[1] and of § 2(a), (d), and (e) of the Clayton Act as amended by the Robinson-Patman Price Discrimination Act.[2] Uinta and Utah Cooperative own a refinery in Colorado and market petroleum products in Utah. Continental and Texaco are major, integrated oil companies doing business in Utah.

The Sherman Act allegations of the complaint charge a conspiracy to restrain trade and an attempt to monopolize commerce in gasoline by controlling sources of supply, by fixing and maintaining wholesale and retail gasoline prices, and by suppressing competition of independent jobbers. The Robinson-Patman violations are said to consist of price discriminations

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1 15 U.S.C. § § 1 and 2.
2 15 U.S.C. § 13(a), (d), and (e).

which affect competition and tend to monopoly. The Continental answer denies these allegations and, as an affirmative defense to the Robinson-Patman charge, says that if there has been price discrimination, the lower price to any purchaser was made in good faith to meet an equally low price of a competitor or was in response to changing conditions affecting the gasoline market.

Continental caused subpoenas duces tecum to be served on the appellants and a number of other non-party witnesses who are independent oil marketers. The appellants moved to quash the subpoenas. After extensive hearings the trial court filed a comprehensive memorandum and ordered the production of information by the non-party witnesses relating to their purchase price of gasoline, their sale prices and gallonage of gasoline sold other than at retail, and the number and location of their service stations. Texaco has adopted and supports the position of Continental.

The threshold question is the jurisdiction of this court to review the order. Under 28 U.S.C. § 1291 the courts of appeals have jurisdiction "of appeals from all final decisions of the district courts of the United States."[3] Continental says that the order is interlocutory and not final.

Appellants recognize that generally the denial of a motion to quash a subpoena issued under Rule 45, F.R.Civ.P., is not appealable[4] because the order is

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3 28 U.S.C. § 1292 relating to appeals from certain interlocutory orders is not applicable and no effort is made to sustain jurisdiction under that section.

4 See 5 Moore, Federal Practice 1726 (2d ed.).

interlocutory to the main litigation and the effect of the discovery will be determined at the trial; but they say that this rule does not apply when the subpoena is enforced against non-party witnesses who will suffer irreparable harm from the enforced disclosures and who have no recourse other than appeal from the order itself.[5]

In Cobbledick v. United States, 309 U.S. 323, an appeal from the denial of a motion to quash a subpoena for appearance before a grand jury, the Supreme Court stated the general rule of unreviewability of interlocutory orders and the reasons therefor—principally the avoidance of piecemeal reviews of litigation. In so deciding the Court commented that due regard for efficiency in litigation must not go so far as to deny all opportunity for the review contemplated by the statutes.[6] This concept was enlarged in Cohen v. Beneficial Loan Corp., 337 U.S. 541, 546, 547, which recognized a small class of cases "which finally determine claims of rights separable from, and collateral to, rights asserted in the action" and held an interlocutory order appealable "because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it."

Beneficial was followed in Swift & Co. v. Compania Caribe, 339 U.S. 684, 688-689, where the Court held an interlocutory order appealable and said that in the circumstances of the case the provision for appeals only

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5 Our recent decision in Paramount Film Distrib. Corp. v. Civic Center Theatre, 10 Cir., 333 F.2d 358, has no application because there the complaints against discovery were made by parties to the litigation.

6 309 U.S. 323, 329.

from final decision "should not be construed so as to deny effective review of a claim fairly severable from the context of a larger litigious process." The principle was again recognized in DiBella v. Unietd States, 369 U.S. 121, 125, where the Court said that "the concept of finality as a condition of review has encountered situations which make clear that it need not invite self-defeating judicial construction."

The threshold question of appealability is not to be decided by rote,[7] because cognizance must be given to the competing requirements of finality and fairness to the witness. Appellants say that the trial court's order will cause irreparable harm because the revelation of their trade secrets will destroy their businesses. This claim is without the mainstream of the litigation. Postponement of consideration might destroy the claimed right.[8] More importantly, the appellants, as non-parties to the main suit, will have no right of appeal from a judgment therein. The trial court's order, final as to these appellants, commands them to divulge the requested information. Such order is both collateral to the main suit and final as to these appellants. DiBella says[9] that the concept of finality must not be used to frustrate appellate review of an order collateral to the principal litigation "when the practical effect of the order will be irreparable by any subsequent appeal."

Severability of the appellants' claim from the issues presented by the plaintiffs and defendants must not

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7 Horizons Titanium Corp. v. Norton Co., 1 Cir., 290 F.2d 421, 423.

8 See Lee v. Western Wool Processors, Inc., 10 Cir., 313 F.2d 13, 15, certiorari denied 374 U.S. 806.

9 369 U.S. 121, 126.

be confused with relevance of the information sought by the subpoenas. In one instance the question is the right of protection against disclosure of alleged trade secrets. In the other the question is the pertinence of the information to main suit issues. Relevance will be determined in the trial of the main issues and the dissatisfied party will have the right of review. So far as the appellants are concerned the ultimate determination of relevance will be "empty rite"[10] because the harm which they fear will have occurred.

We are not impressed with the argument of Continental that the appellants may obtain review by disobedience of the order and appeal from a subsequent adjudication of contempt. These non-party witnesses should not be required to expose thetmselves to the hazard of punishment in order to obtain a determination of their claimed rights.

What we have said does not mean that every order on a motion to quash a subpoena is appealable. Here we have a serious claim by non-party witnesses of a right to protection from the disclosure of trade secrets. Their claims are in the language of Swift & Co. v. Compania Caribe,[11] "fairly severable from the context of a larger litigious process." The practical effect of the order will be irreparable by any subsequent appeal.[12] In our opinion the order is appealable.

The subpoena as limited by the court order requires the production of documents showing, for the state of Utah during a designated period:

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10 See Swift & Co. v. Compania Caribe, 339 U.S. 684, 689.
11 339 U.S. 684, 689.
12 DiBella v. United States, 369 U.S. 121, 125.

"1. Actual purchase price of all gasoline purchased.

"2. Actual sales price of all gasoline sold other than at retail.

"3. Volume in gallons of gasoline sold each month segregated according to City, with separate figures for regular and premium.

"4. Number and location of service stations owned, operated or leased."

Rule 45(d) covers subpoenas for taking depositions and permits them to require the production of designated documents which are within the scope of the examination permitted by Rule 26(b), subject however to the provisions of Rule 30(b) and Rule 45(b). Rule 26(b) permits the examination of a deponent on any matter "which is relevant to the subject matter involved in the pending action." Rule 30(b) provides that "for good cause shown" the court may make any order "which justice requires to protect the party or witness from annoyance, embarrassment, or oppression." Rule 45(b) authorizes the court to "quash or modify the subpoena if it is unreasonable and oppressive." Accordingly, if the documents are relevant and are sought for good cause they should be enforced unless the documents are privileged or the subpoenas are unreasonable, oppressive, annoying, or embarrassing.[13]

Relevancy is shown. The complaint charges restraint of trade and monopoly in the fixing of gasoline

13 Boeing Airplane Co. v. Coggeshall, D.C. Cir., 280 F.2d 654, 659.

prices and in the suppression of competition. Affidavits of some of the appellants establish that "fierce" competition pervades the Utah gasoline market; that appellants are "substantial competitors" of Continental; and that several of the appellants are supplied by major integrated oil companies which the complaint names as co-conspirators with Continental. The Robinson-Patman charge of price discrimination is met by the defense of a good faith effort to meet competition. Continental submitted proof that it was losing market position in Utah; that its management believed that its wholesale prices were above competitive levels; that competitive wholesale prices could not be obtained by estimates from observable retail price levels; and that from the available information it concluded that most independent service stations, including those supplied or operated by appellants, were being charged less for gasoline than Continental was charging its dealers. The wholesale price and volume of admitted competitors directly pertain to both the Sherman Act and the Robinson-Patman Act charges and to the defenses asserted against those charges.

Appellants insist that the good faith meeting competition defense is not available because of the decision in Federal Trade Commission v. Sun Oil Co., 371 U.S. 505. The cases are different. In Sun Oil an integrated supplier-dealer lowered its price to the lessee-operator of one of its stations so that he could meet the competition of another retailer. The court said[14] that Congress in passing the Robinson-Patman Act intended that "businessmen at the same functional level would start

14 371 U.S. 505, 520.

on equal competitive footing so far as price is concerned." The Sun Oil case dealt with different functional levels and the Court held that the good faith meeting competition defense was not available. In so doing the Court pointed out that the defense is usually available in a situation where one supplier reduces its prices and another supplier then reduces its prices to prevent its customer from shifting his business to the competing supplier.[15] In the case at bar Continental claims that the appellants are supplier-retailers and their competition with Continental is admitted.

We are dealing with a preliminary matter—the right to take depositions and to force the production of documents. The showing of Continental is of competition in the area of the charges made in the complaint and of operations at the same functional level. In these circumstances the good faith meeting competition defense is available under § 2(b) of the Robinson-Patman Act. Additionally, we believe that the showing is sufficient under the Sherman Act charges of restraint of trade and monopoly by fixing gasoline prices and suppressing competition of independent jobbers. Exploration into the businesses of admitted rivals may well reveal the validity or invalidity of the charge of competition suppression.

In holding that the material sought by the subpoenas is relevant to the issues of the case we express no opinion as to whether any evidence so produced will

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15 The Court said, 371 U.S. 505, 512, n. 7, that if Super Test, the retail competitor of Sun's dealer, were "an integrated supplier-retailer, or that it had received a price cut from its own supplier—presumably a competitor of Sun—we would be presented with a different case, as to which we herein neither express nor intimate any opinion."

be admissible at the trial or, if admissible, what its effect will be. Such determinations are not appropriate at this stage of the case.

The evidence sought has substantial value because it is relevant and vital to the defenses asserted. The fact that it might be obtained, at least in part, from others has no pertinence because a person may not avoid a subpoena by saying that the evidence sought from him is obtainable from another. The argument that Continental knows the appellants' retail prices, which are posted in public view, means nothing because Continental asserts that competition exists at the wholesale level.

Appellants say that if Continental did not know the wholesale prices, it may not rely on them to support a meeting competition defense. The test is not actual knowledge but "the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor."[16] Continental says that it had reason to believe that it was meeting a lower price and that it acted on the best available information. The reasonableness of Continental's action can best be shown by the production of the competitive prices.

Enough has been said to dispose of the argument that Continental has failed to show good cause. The burden of so showing is sustained by proof of relevance and need.[17] The cases relied on by appellants are not

16 Federal Trade Commisson v. A .E. Staley Mfg. Co., 324 U.S. 746, 759-760. See also Forster Mfg. Co. v. Federal Trade Commission, 1 Cir., 335 F.2d 47, 56.

17 See Boeing Airplane Co. v. Coggeshall, D.C. Cir., 280 F.2d 654, 659.

apposite. In neither Hartley Pen Co. v. United States District Court, 9 Cir., 287 F.2d 324, nor United States v. Serta Associates, Inc., N.D. Ill., 29 F.R.D. 136, was relevancy established.

Appellants contend that general relevancy is not sufficient to require a non-party witness to divulge trade secrets. The claimed trade secrets do not relate to processes, formulas, or methods but rather to price, cost, and volume or sales of gasoline. The argument is that the disclosure of this information will enable Continental and others to destroy appellants' businesses because the integrated companies can lose money in marketing and still show an over-all profit while the small independents, such as appellants, cannot do so. The position is based on the fact that Continental and appellants compete in the wholesale market. No absolute privilege protects the information sought here from disclosure in discovery proceedings.[18] The claim of irreparable competitive injury must be balanced against the need for the information in the preparation of the defense. Judicial inquiry should not be unduly hampered. Inconvenience to third parties may be outweighed by the public interest in seeking the truth in every litigated case.[19] The balancing demands the exercise of a sound discretion by the trial court.

In the case at bar the trial court reasonably concluded that the interests of justice require the enforcement of the subpoenas. With great care it imposed conditions designed to protect appellants. The docu-

18 See 4 Moore, Federal Practice 1288-1289 (2d ed.).

19 United States v. Lever Bros. Co., S.D.N.Y., 193 F.Supp. 254, 257-258, appeal dismissed 371 U.S. 207, motion for leave to file petition for certiorari denied 371 U.S. 932.

ments were made available only to counsel and independent certified public accountants and only for the purposes of the case. The court forbade the use of the material "for business or competitive purposes." The right to presence at the depositions was limited. The documents and depositions were to be held by the clerk under seal with access thereto only upon order of the judge. The right to further protective orders upon an appropriate showing was specifically recognized.

In our opinion the actions of the trial court display a sound exercise of discretion. The need for the information is held paramount but reasonable protective measures are supplied to minimize the effect of the appellants. We are concerned with preliminary matters. If the information obtained is pertinent to the antitrust charges and defenses which arise from the Utah gasoline price wars, that information should be available at the trial. Harm may result to some of the appellants but that harm will be a by-product of competition.[20] Certain it is that in this preliminary matter we "can neither eliminate nor mitigate the major economic forces which are productive of these price wars."[21] All questions of the admissibility and effect of the information obtained through the discovery proceedings discussed herein are left for determination at the trial on the merits.

Affirmed.

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20 In H. R. Rep. No. 1422, 81st Cong., 1st Sess. 5-6, quoted in Sun Oil decision, 371 U.S. 505, 519, it is said that: "In any competitive economy we cannot avoid injury to some of the competitors."

21 371 U.S. 505, 525.

# APPENDIX C

## UNITED STATES COURT OF APPEALS
## TENTH CIRCUIT

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JANUARY TERM, 1965

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COVEY OIL COMPANY, VALLEY OIL COMPANY, FRANK FERGUSON, FRED SMITH, and JACK WILES, Appellants,

v.

CONTINENTAL OIL COMPANY and TEXACO, INC., Appellees.

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PYRAMID OIL COMPANY, PREMIUM OIL COMPANY, and QUALITY OIL COMPANY, Appellants,

v.

CONTINENTAL OIL COMPANY and TEXACO, INC., Appellees.

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Before PICKETT and BRATTENSTEIN, Circuit Judges.

This matter is before the court on the application of the appellants for a stay of discovery proceedings directed against them as non-party witnesses in Case No. C-5-62, entitled Uinta Oil Refining Company, et al. v. Continental Oil Company, et al., now pending in the United States District Court for the District

of Utah, Central Division, and on the oral opposition of appellee Continental Oil Company. The plaintiffs in said Case No. C-5-62 are not now before this court and nothing shows that they have been given formal notice of this application. The court is advised that said case No. C-5-62 is now set for trial on April 27, 1965.

It is ordered that to give the appellants an opportunity to apply to the Supreme Court of the United States for a writ of certiorari to review the decision of this court entered herein on January 21, 1965, rehearing denied March 2, 1965, all discovery proceedings against the appellants, or any of them, in said Case No. C-5-62 are hereby stayed until March 30, 1965.

Done this 11th day of March, 1965.

JEAN S. BREITENSTEIN
JOHN C. PICKETT

# APPENDIX D

## THE ROBINSON-PATMAN ACT

"SEC.2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the

foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence or seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." 15 U.S.C.A. 13.

# FEDERAL RULES OF CIVIL PROCEDURE

## RULE 26 - DEPOSITIONS PENDING ACTION

"(b) Scope of Examination. Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

## RULE 30. DEPOSITIONS UPON ORAL EXAMINATION.

"(b) Orders for the Protecton of Parties and Deponents. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall

be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any order which justice requires to protect the party or witness from annoyance, embarrassment or oppression."

"(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable."

RULE 45. SUBPOENA.

"(b) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producting the books, papers documents, or tangible things."